

Custom Mattress Manufacturing, Inc. and United Steel Workers of America, District 10, AFL-CIO, CLC, Local Union 404-U, Petitioner. Case 4-RC-19206

October 30, 1998

DECISION AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held October 3, 1997, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows six for and five against the Petitioner, with two challenged ballots, a number sufficient to affect the results.¹

The Board has reviewed the record in light of the exceptions and briefs, and adopts the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The hearing officer found that Nasim Din is a supervisor within the meaning of Section 2(11) of the Act and recommended that the challenge to her ballot be sustained. The Employer excepts, contending that Din does not possess any Section 2(11) supervisory authority. For the reasons set forth below, we find merit in the Employer's exception.

The Employer manufactures mattresses at its facility in Philadelphia, Pennsylvania. Din is one of four employees in the Employer's sewing department. She spends approximately 8 hours a day working with other department employees on sewing and quilting machines. She is also responsible, along with another employee in the sewing department, for ensuring that work is performed according to a schedule prepared by the Employer's president and plant manager, Edward Davis. Additionally, she tests job applicants to determine if they know how to operate the sewing and quilting machines, opens the plant in the event Davis arrives late, and closes the plant after cleaning the bathrooms and taking the trash out. For these additional duties, Din receives \$2 an hour more than other sewing department employees. Like the other department employees, Din is paid hourly and punches a timeclock. Din receives the same benefits as other employees.

The hearing officer found, and we agree, that the Petitioner failed to show that Din has authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, discipline, direct employees, adjust grievances, or effectively recommend such action. Nevertheless, she found

that Din is a Section 2(11) supervisor based on Din's testimony regarding her recommendations concerning wage increases. From this, the hearing officer found that Din has the authority to make effective recommendations relating to employees' wages, and therefore is a statutory supervisor. We disagree.

In the absence of any other evidence on this point, our analysis of whether Din possesses authority to make recommendations affecting employees' wages is limited to an examination of her brief testimony on this subject. Din's complete testimony on this point is as follows:

HEARING OFFICER: Have you ever recommended that an employee, a particular employee be given a raise?

THE WITNESS: Yes.

HEARING OFFICER: And in those instances when you recommended that an employee receive a raise, did the employee receive the raise, to your knowledge?

THE WITNESS: Yes, they do.

HEARING OFFICER: Have you ever recommended that an employee, a particular employee not be given a raise?

THE WITNESS: Yes.

HEARING OFFICER: And in those instances, does the person receive the raise?

THE WITNESS: Yes, they do.

HEARING OFFICER: Even if you recommend that they don't?

THE WITNESS: No, not that.

THE HEARING OFFICER: I am an employee and you recommend that I don't get a raise, my work has been lousy. Do I get a raise from Ed? Does Ed give raises to people who you say don't give them raises?

THE WITNESS: No, No, No.

This testimony, if credited, establishes that Din has on at least two occasions made recommendations to Davis regarding raises and that when she recommended that a particular employee be given a raise it was given, and vice versa. In and of itself, however, this testimony is insufficient to establish either that the Employer has vested in Din the authority to make recommendations regarding wage increases or that Din's recommendations are effective.

In this regard, we note that there is no indication in Din's testimony of the circumstances under which she made recommendations regarding raises or the actual role that her recommendations played in Davis' decisions. The testimony does not reflect, for example, whether Din was asked to make recommendations regarding pay increases as part of her regular job duties—a factor which would be indicative of supervisory status—or whether she simply volunteered her opinion to Davis from time to time, as might any senior employee. From Din's limited testimony, it is also not possible to determine whether Din's recommendations actually affected Davis' decisions or simply happened to coincide with his or others' independent judgments as to who should get

¹ The Regional Director issued a report on challenged ballots and notice of hearing, recommending that the challenge to the ballot of Maria C. Lozada be sustained, and that a hearing be held for the purpose of resolving issues raised by the challenge to the ballot of Nasim Din. In an order dated November 26, 1997, the Board adopted the recommendations of the Regional Director.

wage increases. Contrary to the hearing officer and our dissenting colleague, we therefore find that the Petitioner has not carried the burden of showing that Din has supervisory authority in this regard.

Moreover, with only 17 employees, the Employer's operation is relatively small. President and Plant Manager Davis is present at the facility most of the time. His office overlooks the production area, and he testified that he observes employees while they work. There is no contention that Davis is not generally familiar with all of the employees' work. Indeed, the record shows that Davis is sufficiently knowledgeable to act without any input from Din. Thus, asked if she reports employees to Davis for poor performance, Din testified, "That's his job to watch," and she corroborated Davis' testimony that he observes employees through a window in his office. Significantly, Din testified that she "doesn't notice [the employees] that much" herself, but rather, just does her job.

It is well established that the party seeking to exclude an individual as a supervisor has the burden of presenting the evidence necessary to establish supervisory authority. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). When evidence is inconclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *The Door*, 297 NLRB 601 fn. 5 (1990). Mere inferences without specific support in the record are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Based on the paucity of evidence regarding the specific nature of Din's recommendations concerning wage increases and what weight, if any, the Employer gave to her recommendations, we are unable to find that they are indicative of statutory supervisory status.

In sum, we find that the evidence fails to establish that Din is a statutory supervisor, and thus the challenge to her ballot should be overruled. Accordingly, we shall remand the case to the Regional Director for the purpose of opening and counting the challenged ballot and for further appropriate action.²

² We find it unnecessary to consider the secondary indicia relied on by the hearing officer, such as Din's status as the Employer's most senior employee, her pay differential, her attendance at meetings with management, her possession of keys to the facility, and the fact that the

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Nasim Din. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER HURTGEN, dissenting.

Contrary to the majority, I would adopt the hearing officer's finding that Nasim Din is a supervisor, and I would sustain the challenge to her ballot. Based on the credited testimony of Din, the hearing officer found that, when Din recommends that other employees receive raises, the employees receive raises. When she recommends that employees do not receive raises, they do not receive raises. This is quite sufficient to show that Din possesses one of the primary indicia of supervisory status. And that is all that is required.

The majority bases its finding that Din is not a supervisor on the lack of additional evidence that Din effectively recommends that employees receive raises, or that there is no independent investigation by her superiors before the raises are given. However, her testimony clearly shows that she *effectively* recommends these actions. There is no credible evidence that her recommendations in this regard are not followed. In these circumstances, I agree with the hearing officer that this primary indicia of supervisory status is clearly shown.

I would also adopt the hearing officer's findings regarding the presence of secondary indicia of supervisory status. She has keys with which she opens and closes the facility. She earns \$2 more per hour than the other employees in her department. She also attends management meetings with top management and another supervisor, and the Employer by memo held Din out to the other employees as their supervisor with responsibility for production and quality in the sewing department. Together with the evidence of primary indicia, these secondary indicia make clear that Din is, in fact, a supervisor.

Employer bestowed on her the title of supervisor. In the absence of primary indicia as enumerated in Sec. 2(11), these secondary indicia are insufficient to establish supervisory status. *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 fn. 2 (1996).